BRIEF OF PETITIONER, RCA MANUFACTURING COMPANY, INC., IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals is printed in the Transcript at pages 463-472, and is reported at 114 F. (2d) 86. The opinion of the District Court is printed in the Transcript at pages 438-450 and is reported at 28 F. Supp. 787.

Jurisdiction.

A. The final judgment of the Circuit Court of Appeals, now sought to be reviewed, was entered on August 14, 1940 (R. 473-474). This judgment reversed the District Court's judgment entered on July 25, 1939 (R. 451-453).

B. The suit was instituted in Equity, in the United States District Court for the Southern District of New York, to establish the right of petitioner to control the radio broadcast of phonograph records produced by it. A declaration of petitioner's rights in the premises and an injunction against the unauthorized use of such records by respondents was sought. The suit was between citizens of different States as is shown by the Findings of Fact of the District Court (R. 412-413). An amount in excess of $3,000 exclusive of interest and costs is here involved (R. 413).

C. The jurisdiction of this Court is invoked under Section 240 of the Act of February 13, 1925, as

amended, 28 U. S. C. A. Section 347 (a), Judicial Code Section 240. The following cases sustain the jurisdiction: *The Ansaldo San Giorgio I* v. *Rheinstrom Bros. Co.*, 294 U. S. 494 (1934); *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202 (1937).

Statement of the Case.

The facts are stated at pages 1-6 of the foregoing petition.

Specification of Errors.

It is respectfully submitted that the following errors were made by the Circuit Court of Appeals:

1. The Court erred in failing to find that respondents W. B. O. Broadcasting Corporation and Elin, Inc. were guilty of unfair methods of competition in broadcasting petitioner's phonograph records without its authorization.

2. The Court erred in failing to find that respondent W. B. O. Broadcasting Corporation knowingly and wilfully induced petitioner's wholesaler and original purchaser to violate the terms of its agreement with petitioner to sell records only for non-commercial use in homes.

3. The Court erred in denying to petitioner the limited restricting effect of the notices appearing on the record labels and envelopes which constituted a legal and valid servitude, not contrary to but in furtherance of public policy.

4. The Court erred in failing directly to recognize

that respondent Whiteman's rights arising from his contributions to the finished phonograph record passed to petitioner by virtue of respondent's employment by petitioner and by reason of two of his three contracts of employment with petitioner.

5. The Court erred in failing directly to recognize in petitioner a common law property right arising from its intellectual contributions to the finished phonograph record.

6. The Court erred in holding that any common law rights of petitioner were abandoned and dedicated by reason of the sale of its phonograph records.

7. The Court erred in reversing the judgment of the District Court and in dismissing the complaint.

Argument.

POINT I.

The unauthorized radio broadcast of petitioner's records by W. B. O. constitutes an unfair method of competition.

W. B. O.'s unauthorized radio broadcast of petitioner's phonograph records constitutes an unfair method of competition by it with petitioner. As the District Court found, petitioner and W. B. O. as a broadcaster of records made by petitioner are in direct competition with one another—in "the business of selling entertainment to the public" (R. 427). In such circumstances it is not considered fair dealing for the broadcaster to appropriate for its own profit the fruits of the investment, enterprise and resource-

fulness of its competitor. This is so whether or not the petitioner as the manufacturer of the records is considered to have a "property" interest in them after their sale for home use only.

Ultimate recognition of this principle is to be found in the holding of this Court in *International News Service* v. *Associated Press,* 248 U. S. 215 (1918), the facts of which are too well-known to be restated. News collected with great expense, ingenuity and labor, cannot be taken and sold while it remains salable by its collector. Although the news agency may have no rights against the public, it has rights against a competitor who purloins its stock in trade. *Associated Press* v. *KVOS,* 80 F. (2d) 575 (C. C. A. 9, 1935), although reversed by this Court on jurisdictional grounds (299 U. S. 269), contains precise recognition that radio broadcasters may not pirate news gathered by another at great effort and expense.

Similarly, a New York Court [*Twentieth Century Sporting Club Inc.*. v. *Transradio Press Service, Inc.,* 165 Misc. 71, 73 (N. Y. S. Ct. 1937)] has held that a radio rebroadcast of a prize-fight may not be made without permission of the fight promoter because (a) "* * * the defendants would be enabled to derive profits from the exhibition without having expended any time, labor and money for the presentation of such exhibition" and (b) the plaintiffs "* * * have taken proper steps to retain these exclusive rights by selling tickets for admission to such exhibition, which tickets contain the following express contract: 'This ticket is sold and purchased and if honored is to be honored upon the express agreement that no motion pictures of the contest herein referred to will be

taken and no broadcasting thereof effected by the purchaser or holder of this ticket except as may be authorized by the promoter' ". A similar holding is contained in *Pittsburgh Athletic Co.* v. *KQV Broadcasting Co.*, 24 F. Supp. 490 (W. D. Pa. 1938), expressly disapproving *National Exhibition Company* v. *Tele-Flash, Inc.*, 24 F. Supp. 488 (S. D. N. Y. 1936).

Equity's power to enjoin unfair *methods* of competition as well as acts of "palming off" has long since been recognized by this Court [*International News Service* v. *Associated Press*, 248 U. S. 215, 241, 242 (1918); *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935); *Coca-Cola Co.* v. *Old Dominion Beverage Corp.*, 271 Fed. 600, 604 (C. C. A. 4, 1921)]. In the *Schechter* case this Court said in part:

> "* * * In recent years, its scope ['unfair competition'] has been extended. It has been held to apply to misappropriation as well as misrepresentation * * * to misappropriation of what equitably belongs to a competitor" (p. 531).

And in the *Coca-Cola* case the Court stated:

> "The right to equitable relief is not confined to cases in which one man is selling his goods as those of another." [*Coca-Cola Co.* v. *Old Dominion Beverage Corp.*, 271 Fed. 600, 604 (C. C. A. 4, 1921)]

Fonotipia, Limited v. *Bradley*, 171 Fed. 951 (E. D. N. Y. 1909), early applied the doctrine of these cases to the phonograph record situation. That case held that it constituted unfair competition to "dub" a phonograph record and sell the copies so made. Its reasoning seems most persuasive:

> "The education of the public by the dissemination of good music is an object worthy of protec-

tion, and it is apparent that such results could not be obtained if the production of the original record was stopped by the wrongful taking of both product and profit by anyone who could produce sound discs free from the expense of obtaining the original record" (p. 963).

Equity condemns such practices. The "ticker" cases [*Board of Trade of the City of Chicago* v. *Christie Grain & Stock Co.*, 198 U. S. 236 (1905); *National Tel. News Co.* v. *Western Union Tel. Co.*, 119 Fed. 294 (C. C. A. 7, 1902); *Illinois Commission Co.* v. *Cleveland Tel. Co.*, 119 Fed. 301 (C. C. A. 7, (1902)] have laid the groundwork for equitable protection of "pecuniary" rights in commercial enterprises. The "ticket-scalper" cases [*Bitterman* v. *Louisville & N. R. Co.*, 207 U. S. 205 (1907); *Pennsylvania Co.* v. *Bay*, 150 Fed. 770 (N. D. Ill. 1906); *Ill. Cent. R. Co.* v. *Caffrey*, 128 Fed. 770 (E. D. Mo. 1904); *Nashville C. & St. L. Ry. Co.* v. *McConnell*, 82 Fed. 65 (M. D. Tenn. 1897)] similarly granted protection against appropriation and use of another's business by one who had jeopardized neither investment nor enterprise in its creation. The "trading stamp" cases [*Sperry & Hutchinson Co.* v. *Mechanics' Clothing Co.*, 128 Fed. 800 (D. R. I. 1904); *Same* v. *Louis Weber & Co.*, 161 Fed. 219 (N. D. Ill. 1908)] prevented the appropriation and sale of cash bonus certificates to defeat the purpose for which they were issued.

The contents of a phonograph record would seem to deserve at least as much protection as news or a narrative of a sporting event. In fact, by reason of their educational significance such records may deserve greater protection. As the District Court found

(Finding 108; R. 432) damage will result to the creator of the record unless equity follows the path clearly defined by the *International News Service* case and enjoins the continuance of the unfair competition which W. B. O. has practiced. As the scholars who drafted the *Restatement of the Law of Torts* (1938) have observed, "the scope of liability in this field is constantly expanding" (*Restatement, Torts,* Vol. 3, p. 538). To permit the Circuit Court opinion to stand would appear therefore to turn the clock backward on a promising development of an equitable doctrine.

Finally, there are certain other admitted activities of W. B. O. which clearly should be condemned by a court of equity. W. B. O.'s announcer admitted that it is his typical practice to intersperse the playing of records with comments, interpolations and speech inflections designed to convey the impression that the orchestra or soloist whose records are being played either is personally present in the studio or that the broadcast is emanating from a hotel or restaurant where the orchestra is then engaged. Stenographic reports of a few W. B. O. broadcasts appear in the Transcript (R. 104-119) and electrical transcriptions of these broadcasts, played at the trial, are available (Exhibits 42-49; R. 381). W. B. O. charges $6100 per week for three hours daily of these broadcasts (R. 119-120). A nation-wide situation is exemplified by the activities of W. B. O. admitted and proved in this case [11 Air Law Rev. 29, 41-55 (1940)]. Equity should not condone such practices.

POINT II.

W. B. O. knowingly and wilfully induced petitioner's wholesaler and original purchaser to violate the terms of its express contract to sell records only for non-commercial use in homes.

The evidence clearly showed that petitioner and Bruno-New York, Inc., RCAM's wholesaler and original purchaser, agreed in writing (Exhibit 34; R. 362), as a condition of the sale of records to it at wholesale prices, that it would resell these records only for non-commercial use in homes. W. B. O. knew of this agreement both as a result of the record label and envelope notices and as a result of express written notice (Exhibits 32, 33; R. 359-361). Nevertheless, a special messenger of Bruno-New York each week delivered records to W. B. O. (R. 121); W. B. O. did not pay retail prices but got a discount (R. 102); to hide the transaction payments were made through a retailer, Commodore Music Shop (R. 121). The District Court readily found that W. B. O. had "knowingly and wilfully procured and induced Bruno-New York, Inc. to breach the provisions of its agreement * * *" with petitioner (R. 436).

Adopting long established criteria laid down in *Bobbs-Merrill Co.* v. *Straus,* 147 Fed. 15, 27 (C. C. A. 2, 1906), petitioner thus proved that W. B. O. "* * * persuaded * * * other persons to violate (the) contract * * *"; that Bruno-New York, Inc. "* * * assented to the terms of the notice or agreed that the absolute title acquired by a sale should be converted into a qualified or restricted title"; and that W. B. O. "* * * purchased their copies from purchasers from com-

plainant". Such deliberate procurement of a breach of contract has long since been condemned [*Lumley* v. *Gye*, 2 El. & Bl. 216; *Heath* v. *American Book Co.*, 97 Fed. 533 (D. W. Va. 1899); *Sperry & Hutchinson Co.* v. *Mechanics' Clothing Co.*, 128 Fed. 800 (D. R. I. 1904)].

Third persons aware of the agreement cannot induce its breach especially where it does not attempt to fix prices or otherwise to violate public policy. This Court should review the refusal of the Circuit Court to follow this long established doctrine.

The Circuit Court based its refusal on the theory that the limited restriction which the agreement between record manufacturer and distributor was designed to effect is contrary to public policy and void and should therefore be disregarded. This contention will now be considered.

POINT III.

The legend on the record labels and envelopes constituted a valid and legal servitude not contrary to public policy.

In November, 1932, petitioner placed on its record labels the legend "Not Licensed for Radio Broadcast" (R. 421). In August, 1937, the legend was expanded to read:

> "Licensed by Mfg. Under U. S. Pats. 1625705, 1637544, Re—16588 (& Other Pats. Pending) Only For Non-Commercial Use on Phonographs in Homes. Mfr. & Original Purchaser Have Agreed This Record Shall Not Be Resold Or Used For Any Other Purpose. See Detailed Notice on Envelope. RCA Manufacturing Co. Inc., Camden, N. J. U. S. A." (R. 421-422).

It is submitted that the limited restriction on use of the records here presented is not contrary to public policy but in furtherance of such policy. The restriction is carefully delimited in scope. It does not operate against the public generally, but, so far as the facts of this case are concerned, only against unauthorized conduct by radio broadcasters as a class. And, its effect is not to deprive them of music or of the services of musicians. It is rather to stimulate the employment of musicians.

As the Circuit Court recognized, the limited restriction is presented by the factual situation and must either be given effect or declared to be void. To refuse it effect upon some vaguely felt theory that it clogs the records with a servitude is to ignore the broader considerations of public policy which favor its existence and to enable a strong economic group, the broadcasters, to reap the fruits of another's investment, enterprise and resourcefulness at nominal cost and with enormous profits to themselves.

The considerations for and against the very limited restriction here involved should be weighed by this Court [as they were weighed by the District Court (R. 433)] and not cast aside, as in the Circuit Court of Appeals, on a theory that restrictions on chattels are *prima facie* invalid—a theory which stands opposed by the express Congressional sanction of the distinctly more debatable practice of permitting a manufacturer to control the resale price of his trademarked articles. We must recognize that we are not dealing with what Lord Coke condemned—conditions which totally restrain alienation by enabling the seller to recover the sold property. We are concerned with provisions which merely give the seller some measure of equitable control in the hands of

later owners who never cease to retain the property. Consideration should therefore be given to the purpose and effect of a limited restriction. It should not be hastily invalidated on the ground that in Queen Elizabeth's day Lord Coke said that restrictions on chattels (meaning *total* restrictions) are bad.

Following this approach rather than a mechanical one of viewing all restrictions as bad, the Courts have held restrictions valid in a number of situations. Implicit in the cases is the conclusion of the Court that the restrictions, although in some way limiting complete alienation of the chattel, were, nevertheless, not contrary to public policy and hence enforcible (*Oregon Steam Navigation Co.* v. *Winsor*, 87 U. S. 64 (1874); *Bitterman* v. *Louisville & N. R. Co.*, 207 U. S. 205 (1907); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 305 U. S. 124 (1938); *Independent Wireless Telegraph Company* v. *Radio Corporation of America*, 269 U. S. 459 (1926); *Dickerson* v. *Tinling*, 84 Fed. 192 (C. C. A. 8, 1897); *P. Lorillard Co.* v. *Weingarden*, 280 Fed. 238 (W. D. N. Y. 1922); *In re Waterson Berlin & Snyder Co.* v. *Irving Trust Co.*, 48 F. (2d) 704 (C. C. A. 2, 1931); *Werderman* v. *Societe Generale d'Electricite*, 19 Ch. D. 246; *Lord Strathcona Steamship Co.* v. *Dominion Coal Co. Ltd.* (1926) A. C. 108). In general, restrictions which have been invalidated have been those which sought to fix resale price or effect tying arrangements—situations which, under the anti-trust laws, are generally regarded as *per se* illegal. Obviously, no such situation is here presented.

POINT IV.

The Court erred in failing directly to recognize that respondent Whiteman's rights passed to petitioner.

Respondent Whiteman will advance legal argument in his petition for a writ of certiorari to be submitted concurrently herewith to support his contention that property rights are vested in the artist whose performance is embodied in a phonograph record [*Waring* v. *WDAS Broadcasting Station*, 327 Pa. 433 (1937)]. Petitioner need not elaborate on that point here. Petitioner contends that the Circuit Court should have found, as did the District Court herein, that these rights passed to it by virtue of Whiteman's employment by it and because of two of the three contracts under which he was so employed (Exhibits 4, 5; R. 338-342).

The law has been long settled by this and other Federal Courts that when one engages another to produce artistic or intellectual work with the intention that the product shall be sold by the one for whom it is made, the entire property in that product passes to the employer. Only an express reservation of rights will alter the effect of this rule (*Solomons* v. *United States*, 137 U. S. 342 (1890); *Gill* v. *United States*, 160 U. S. 426 (1895); *Bleistein* v. *Donaldson Lithographing Company*, 188 U. S. 239 (1902); *Standard Parts Co.* v. *Peck*, 264 U. S. 52 (1923); *Lumiere* v. *Pathé Exchange, Inc.*, 275 Fed. 428 (C. C. A. 2, 1921); *Lumiere* v. *Robertson-Cole Distributing Corp.*, 280 Fed. 550 (C. C. A. 2, 1922), cert. den. 259 U. S. 583). The rule has been expressly embodied

into the Copyright Law of the United States (17 U. S. C. §62), and the principle was early applied to works of an artistic nature in *Dielman* v. *White*, 102 Fed. 892 (D. Mass. 1900), and recently approved in *Yardley* v. *Houghton Mifflin Co. Inc.*, 108 F. (2d) 28 (C. C. A. 2, 1939).

Moreover, two of the contracts of employment between petitioner and respondent Whiteman (Exhibits 4, 5; R. 338-342) clearly granted to petitioner all of Whiteman's rights in the records embodying his performances. In the first agreement (Exhibit 4; R. 338-341) Whiteman specifically assigned these rights to petitioner. The second agreement (Exhibit 5; R. 342), it was found, embodied the terms of the first agreement (R. 415). At least two Courts have held that language similar or identical to the wording contained in the first agreement serves to vest the petitioner with all rights of the artist (*Ingram* v. *Bowers*, 57 F. (2d) 65 (C. C. A. 2, 1932); *Noble* v. *One Sixty Commonwealth Avenue, Inc.*, 19 F. Supp. 671 (D. Mass. 1937).

POINT V.

The Court erred in failing directly to recognize in petitioner a common law property right arising from its intellectual contributions to the finished phonograph record.

The uncontroverted evidence to the effect that petitioner contributed to the finished phonograph records the fruits of its highly specialized training in the field of sound recording should have convinced the lower courts that petitioner is entitled to a common law right of intellectual property in its product.

A.

The Facts of Petitioner's Contribution.

Petitioner's witnesses presented a detailed picture of the activities of RCAM's employees necessary to produce an artistically pleasing and satisfactory phonograph record. Only the highlights can be indicated in the limited scope of this brief.

Acoustic draperies in the recording studio must be arranged. Special equipment must be expertly placed, tuned to exigencies of the studio and artistically manipulated and "played" during the recording session. Performers must be constantly supervised both in their musical renditions, their comparative positions in the studio in relation to the microphones, and in their maintenance of the intangible musical "balance" necessary to a perfect record. What sounds well in a concert hall may not record well. Even Maestro Arturo Toscanini relies upon the skill and artistry of petitioner's musical director in performing for recordings. An outstanding conductor, Arthur Fiedler, and a well-known virtuoso, Mishel Piastro, bore witness to the contributions of the petitioner (R. 150-167; 170-203), details of which may be found in the Transcript.

B.

Legal Authorities Supporting Recognition of Petitioner's Common Law Right.

"Intellectual labor, skill and individuality enter into the preparation of such records" (13 C. J. 1033). Forceful analogy to the instant situation is derivable

from the opinion of this Court in *Burrow-Giles Lithographic Company* v. *Sarony*, 111 U. S. 53 (1884). There the photographer's efforts in posing the subject, selecting costume and draperies, arranging light and shadow and evoking the desired expression were held to "* * * show this photograph to be an original work of art, the product of plaintiff's intellectual invention, of which plaintiff is the author * * *" (pp. 59-60).

Similar recognition has long since been given to the artistic contribution made by the motion picture producer [*Universal Film Manufacturing Company* v. *Copperman*, 218 Fed. 577 (C. C. A. 2, 1914)]. And, recently this Court has acknowledged the contribution of the motion picture producer to be "found in the artistic conceptions and in the expert supervision and direction of the various processes which made possible the composite result with its attractiveness to the public" [*Sheldon* v. *Metro-Goldwyn Pictures Corporation*, 84 L. Ed. 576, 583 (1940)]. These holdings are analogous to the instant situation. For, just as the talents of the actors and directors give expression to the motion picture scenario, so do the abilities of the recording artists and recording director articulate the recorder's conception of what should be captured in order to produce an artistically pleasing phonograph record.

The English Courts have directly recognized the artistry of the recorder's contribution in *Gramophone Company, Ltd.* v. *Stephen Carwardine Co.*, L. R. (1934) 1 Ch. 450. There it was said:

> "* * * skill, both of a technical and of a musical kind, is needed for the making of such a record

as the one in question. The arrangement of the recording instruments in the building where the record is to be made, the building itself, the timing to fit the record, the production of the artistic effects, and, perhaps above all, the persons who play the instruments, not forgetting the conductor, combine together to make an artistic record, which is very far from the mere production of a piece of music."

Finally, at least one Federal Court has recognized the property right of the recorder. In *Fonotipia Limited* v. *Bradley*, 171 Fed. 951 (C. C. E. D. N. Y., 1909), the practice of making matrices from commercial records and manufacturing records for public sale from these "dubbed" matrices was enjoined. The records involved in that case were produced by the since outmoded mechanical process. Modern invention has facilitated the making of finer and more artistic records by electrical means (R. 153). If a property right existed in those records, *a fortiori*, it should be recognized in modern recordings.

Petitioner thus contends that it is the proprietor of a common law right of intellectual property. The Circuit Court should have directly found this right to repose in petitioner.

POINT VI.

The Circuit Court erred in finding that these rights were abandoned and dedicated.

Petitioner contends that these rights were neither abandoned nor dedicated.

Certainly, as the Circuit Court found, performance of these records did not result in such dedication

[*Ferris* v. *Frohman*, 223 U. S. 424, 435 (1912); *Uproar Co.* v. *National Broadcasting Co.*, 81 F. (2d) 373 (C. C. A. 1, 1936)].

Nor does the marketing of these records by petitioner result in the loss of these common law rights. For, literary property rights cannot be lost unless there accompanies the alleged dedication, an intent or indication by the proprietor to abandon his work to the public [*International News Service* v. *Associated Press*, 248 U. S. 215, 240 (1918)]. RCAM's conduct clearly negatives any such intention. Throughout the years, it has jealously guarded its rights by litigation (R. 49), by asserting rights against and dealing with radio broadcasters (Exhibits 7, 8, 12, 37-41B; R. 346-348, 352, 366-381) and other commercial users of its records (Exhibits 10, 11; R. 348-351), by placing notices on its record labels and envelopes that its product was not licensed for radio broadcast and was to be used only for non-commercial purposes (R. 421-422), and, pending this action, by advising respondent W. B. O. to refrain from broadcasting its records (Exhibits 32, 33; R. 359-361).

The Court in *Fonotipia Limited* v. *Bradley*, 171 Fed. 951 (E. D. N. Y. 1909), could not have restrained the manufacture of "dubbed" records unless it recognized the existence of the recorder's rights and the fact that public sale of records did not dissipate, dedicate or result in abandonment of these rights. Yet in the instant case, the Circuit Court seems to have held that petitioner's sale of records so completely strips it of rights as to render legal the copying of the contents of these records by purchasers thereof. In so holding, the Circuit Court has cast doubt upon the venerable holding of the *Fonotipia* case and may

thereby have deprived the recorder of all protection against even the meanest despoiler of its priceless property. Such a holding should not go unconsidered by this Court.

Finally, respected legal historians have long contended that publication does not affect the existence of common law rights in artistic property uncopyrightable under the statute. This contention, overruled by the Circuit Court in this case and in *Fashion Originators Guild of America, Inc.* v. *Federal Trade Commission*, 114 F. (2d) 80, 83, 84 (C. C. A. 2, 1940), is now squarely presented to this Court. *Wheaton* v. *Peters*, 33 U. S. 591 (1834), usually cited as authority for the general rule that common law rights of literary property succumb upon first publication, does not so hold. It dealt merely with the displacement of common law by statutory copyright. If the work was copyrightable under the statute, publication killed the common law right. *Holmes* v. *Hurst*, 174 U. S. 82 (1899), explains the basis of the *Wheaton* case as being *Donaldson* v. *Becket*, 4 Burr. 2408, a simple holding that common law copyright yields to statutory copyright. It also declares, however, that the *Donaldson* case and the earlier English case of *Millar* v. *Taylor*, 4 Burr. 2303, are established and respected authority for the proposition that common law copyright, unfettered by statutory copyright, is perpetual and survives publication (Drone, Law of Intellectual Production, pp. 8-53). It is submitted that judicial statements to the contrary (*Caliga* v. *Inter Ocean Newspaper Company*, 215 U. S. 182 (1909); *Jewelers' Mercantile Agency* v. *Jewelers' Weekly Publishing Co.*, 155 N. Y. 241 (1898), and similar cases) are uniformly dicta delivered in cases

where works copyrightable under the statute were concerned. Phonograph records have been placed beyond the pale of statutory copyright [see *Witmark & Sons* v. *Standard Music Roll Co.*, 221 Fed. 376 (C. C. A. 3, 1915)]. This question, long of interest to legal scholars and practitioners, should be finally passed upon.

POINT VII.

Foreign recognition of recorders' rights.

Protection of the rights of phonograph recorders has long been the subject of discussion outside of the United States. The recorder is granted control over the use of its records by the laws of the United Kingdom, Ireland and the British Dominions and Colonies [see *British Copyright Act of 1911*, §19 (1)]. Switzerland (Law of December 7, 1922, Arts. 4, 21), Portugal (Act of May 27, 1927, Art. 27) and others have granted similar recognition. The decision of a lower Norwegian Court which denied protection to the recorder in the absence of statute (*The Gramophone Company, Ltd.* v. *Norsk Rikskringkasting*, Case No. 1421, Section 8, No. 76, March 22, 1938) has recently been reversed and the recorder's power to control radio broadcast of its records has been acknowledged. The report and citation of this case is not presently available. Thus there is here presented an issue of widespread importance and universal interest.

CONCLUSION.

It is therefore respectfully submitted that upon the errors set forth in the petition and in this brief, and because of the novelty and importance of the questions herein presented, the petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

DAVID MACKAY,
LAWRENCE B. MORRIS,
JEROME H. ADLER,
Counsel for Petitioner.

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